LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED
AUG 1 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 154

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, *Petitioner*,

v.

THE REPUBLIC OF CHINA, CHINA MERCHANTS STEAM NAVIGATION COMPANY, LIMITED, and THE UNITED STATES OF AMERICA, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE REPUBLIC OF CHINA AND CHINA MERCHANTS STEAM NAVIGATION COMPANY, LIMITED, IN OPPOSITION

ROBERT E. KLINE, JR.
RONALD A. CAPONE
917 Munsey Building
Washington 4, D. C.

WILLIAM A. GRIMES
640 Mathieson Building
Baltimore 2, Maryland

Proctors for Respondents
The Republic of China
and China Merchants
Steam Navigation
Company, Limited.

Of Counsel
KIRLIN, CAMPBELL & KEATING
and
OBER, WILLIAMS, GRIMES
& STINSON

August 4, 1958

D. C.

INDEX

	Page
Citations of Opinions Below	1
Questions Presented	2
Statement of the Facts	3
A. The Insured	3
B. The Insurer and the Policies	7
C. The Six Hong Kong Vessels	13
D. The HAI HSUAN	18
Decisions Below	22
There are No Special and Important Reasons for Granting the Writ	24
A. As to Barratry	25
B. As to Capture and Seizure	29
Conclusion	34
Appendix A	1a

Table of Cases

Allen v. *Trust Co. of Georgia*, 236 U.S. 630	33
American Insurance Co. v. *Dunham*, 12 Wend. (N.Y.) 463 (1834)	29
Calmar S.S. Corp. v. *Scott*, 209 F. (2d) 852 (2 Cir., 1954)	29, 31
Comstock v. *Group of Institutional Investors*, 335 U.S. 211	33
Corn Products Co. v. *Commissioner*, 350 U.S. 46	33
Cory v. *Burr*, (1883) 8 App. Cas. 393	21, 31
Cutting v. *Bryan*, 30 F. (2d) 754 (9th Cir., 1929)	13
Dixon v. *Reid*, (1822) 5 Barn. & Ald. Rep. 597, 106 Eng. Rep 1309	29
Earle v. *Rowcroft*, (1806) 8 East 126, 103 Eng. Rep. 292	24, 25
Greeve v. *Pacific Mutual Ins. Co.*, 91 Mass. (9 Allen) 217	22, 23, 30, 32
Guaranty Trust Co. v. *United States*, 304 U.S. 126	27, 28
Lanasa Fruit Co. v. *Universal Insurance Co.*, 302 U.S. 556	29
Lauritzen v. *Larsen*, 345 U.S. 571	27

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 .....
Mentz, Decker & Co. v. Maritime Ins. Co., Ltd., (19[illegible] 16 Comm. Cas. 17 .....
Minden, The; (1942) A.C. 50 .....
Pike v. Merchants' Mutual Insurance Co., 26 La. Ann. 392 (1874) .....
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 .....
Roscow v. Corson, (1819) 8 Taunt. 684, 129 Eng. Rep. 550 .....
Standard Oil Co. of New Jersey v. United States, 340 U.S. 54 3
United States v. Pink, 315 U.S. 203 2
Vallejo v. Wheeler, (1774) 1 Cowp. 143, 98 Eng. Rep. 836 29
Waters v. Merchants' Louisville Ins. Co., 11 Peters (36 U.S.) 213 29

TEXTS AND TREATISES

5 Appleman, *Insurance Law and Practice*, (1941) Sec. 3256, note 37 30
2 Arnould *On Marine Insurance* (14th ed., 1954) Sec. 858 ..... 29, 31
3 Corbin *On Contracts* (1951) Sec. 558 13
57 Corpus Juris, Sec. 3, *Seizure*, p. 105 30
45 Corpus Juris Secundum, Sec. 863, *Insurance*, p. 939 30
Fairplay, The Weekly Shipping Journal, (London) Vol. 188, p. 1247, May 23, 1957 ..... 30, 31, 1a
18 Halsbury's *Laws of England*, (2nd ed., 1935) p. 322, note (p) 31
Mullins, Hugh, *Marine Insurance Digest* (1951), p. 21 29
1 Oppenheim, *International Law*, (2d ed.) pp. 108-109 27
1 Parsons, *Law of Marine Insurance*, (1868) p. 854 .. 30
1 Phillips, *Insurance*, (5th ed., 1867) p. 652 30

Post Magazine & Insurance Monitor:

Vol. 118, p. 789, June 13, 1957 ..... 3a
Vol. 118, p. 1011, July 25, 1957 ..... 30, 6a
Vol. 118, p. 1127, August 15, 1957 ..... 10a
Vol. 119, p. 803, June 12, 1958 ..... 11a

Richards, *On Insurance*, (4th ed., 1924) p. 834 30
38 *Words and Phrases* (Perm. ed.) p. 526 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 154

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, *Petitioner,*

v.

THE REPUBLIC OF CHINA, CHINA MERCHANTS STEAM NAVIGATION COMPANY, LIMITED, and THE UNITED STATES OF AMERICA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE REPUBLIC OF CHINA AND CHINA MERCHANTS STEAM NAVIGATION COMPANY, LIMITED, IN OPPOSITION

CITATIONS OF OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R. 4-54[1]) is reported at 151

[1] "R" and "Blue R" will refer to petitioner's appendix and respondents' appendix, respectively, in the Court of Appeals. "Thomsen, R." will refer to the District Court opinion as printed in petitioner's appendix in the Court of Appeals. "Pet. App. A" will refer to the Court of Appeals opinion as reprinted in the appendix to the petition filed herein.

F. Supp. 211. The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. A1-A19) is reported at 254 F. 2d 177.

The judgment of the Court of Appeals was entered on April 8, 1958. The petition for a writ of certiorari was filed on July 5, 1958.

QUESTIONS PRESENTED

1. The principal question is whether the losses of seven vessels owned by the Government of The Republic of China and under mortgage to the United States, which were caused by the acts of the masters and/or mariners of such vessels (disobedience of orders, sailing into or remaining in a forbidden port, retention of the vessels in derogation of the rights of the owner, hoisting of the Chinese Communist flag, etc.), are covered by the risk of "barratry" for which petitioner is liable under marine or war risk insurance policies[2], or whether such losses are excluded from coverage on the ground that such acts also constitute "seizure" within the meaning of the F. C. & S. ("Free of Capture and Seizure") warranty of the marine policies or the clause "excluding capture and seizure" in the war risk policies.

2. Fairly comprised within the above question is the issue as to whether petitioner is liable under the marine or war risk policies because of the barratrous acts which preceded the hoisting of the Communist flag on the vessels.

---

[2] Barratry is covered by the marine policy; barratry consequent upon "civil war, revolution, rebellion, or insurrection or civil strife" is covered by the war risk policy.

3. The remaining issue is whether, in the alternative, petitioner is liable under the provision in the war risk policies insuring against "risks of civil war, revolution, rebellion, or insurrection or civil strife arising therefrom", regardless of barratry. This issue was raised by the libelants below, (R. 5), but neither of the lower courts found it necessary to decide the point.

STATEMENT OF THE FACTS

The decisions in the District Court and the Court of Appeals turn in large measure upon the extensive findings of fact of the District Court. These findings number in excess of 300 and are amplified in some respect in the opinion of the District Court. The Court of Appeals was in complete agreement with the findings of the District Court, and pointed out in its opinion that reference should be made to the District Court opinion and findings of fact for "detailed information" (Pet. App. A2). However, the petition has omitted pertinent facts upon which the decisions below depended which are essential to a proper consideration and disposition of the Petition for a Writ of Certiorari. Therefore, respondents (The Republic of China and China Merchants Steam Navigation Company, Limited,—"CMSN") deem it important to summarize the facts somewhat more extensively than otherwise would be necessary.

A. The Insured

On various dates during 1946 and 1947, the United States sold to "The Government of The Republic of China" a number of vessels, including the seven involved in these suits (Fdgs. 2, 3; R. 66-67; Thomsen, R. 7). At the time of the sales, the Chinese Commu-

nists dominated the northern part of China (Thomsen, R. 6; Pet. App. A3) It was the policy of the United States to see to it that vessels were not sold to Communist countries or Communist satellites, and the vessels were *not* sold to the Chinese Communists (Fdg. 3, R. 67).

At the time of the sales, hypothecations or preferred ship mortgages and promissory notes to secure payments of the purchase prices were executed by the "Government of The Republic of China", which were and are still held[3] by agencies of the United States—the Maritime Administration (Maritime) and the Export-Import Bank of Washington (Eximbank) (Fdgs. 4-7, R. 67-68; Thomsen, R. 7; Pet. App. A2-3). Because of defaults in these mortgages which occurred in October, 1949, each of the mortgages were declared in default by Maritime and Eximbank on or about January 17, 1950, a day or two after Communist flags were hoisted on the vessels in Hong Kong. As a consequence, the United States, which had security title to the vessels, acquired the right to retake them (Fdg. 6, R. 67-68; Thomsen, R. 7; Pet. App. A3). As of December 31, 1956, the total amount due under the mortgages exceeded $3,600,000.[4]

---

[3] Although it does not effect disposition of the issues in the suits, in 1957 the United States succeeded in regaining possession of the HAI HSUAN which had continuously remained in Singapore since her loss in 1950, and sold the vessel for the gross sum of $150,102. Net salvage in the amount of $111,439.84 accrues to the benefit of the insurer and has already been credited against liability for total loss under the insurance policies.

[4] The amount stated in footnote 5 of the petition is an inadvertent error. The correct principal due is $3,510,860. See Thomsen, R. 7. Interest on the principal amounts has been accruing at 6% per annum since the declaration of default.

At the time of their sales, as well as when the losses occurred, the seven vessels and other similarly acquired vessels were registered in the name of and were being operated on behalf of the Government of The Republic of China by China Merchants Steam Navigation Company, Limited, (CMSN), a corporation wholly owned and controlled by said Government.[5] The company's head office was located at Shanghai until May, 1949, when it was transferred to Taipei, Taiwan, pursuant to government orders (Fdg. 15, R. 70-71; Pet. App. A4). The company maintained a branch office at Hong Kong until defection of most, but not all, of the branch office personnel on January 13, 1950 (Fdg. 17, R. 71; Pet. App. A4).

During the latter part of 1949, prior to the loss of the vessels as well as prior to British recognition of the Chinese Communist regime, again pursuant to government orders, the port of registry of each of the vessels in question was transferred to a port in Taiwan (Fdgs. 31, 32, R. 75-76; Pet. App. A4)—an important fact not mentioned in the petition.

During 1949, Chinese Communist military forces started to drive southward on the mainland of China; and, as of April 19, 1949, a state of civil war existed between the Government of The Republic of China and the Chinese Communist regime. The Government of The Republic of China itself was also forced to move its capital from Nanking to Canton on April 19, 1949, thence to Chungking and to Chengtu, and finally, to Taipei, Taiwan on December 9, 1949 (Fdgs. 8, 9, R.

[5] Prior to September, 1948, CMSN functioned as an unincorporated company. On September 9, 1948, the company was reorganized into a limited stock company (Fdgs. 11, 12 and 13, R. 70).

68-69; Pet. App. A3). As noted by the Court of Appeals, since December 9, 1949, the Government of The Republic of China "has continued to operate on Taiwan as a sovereign entity." (Pet. App. A3). "That government, although now driven from the mainland, is still in existence and is in complete control of the island of Taiwan and its inhabitants . . ." (Pet. App. A17). "It is recognized by the United States as the only proper and lawful government of China and its officials are the accredited representatives of The Republic of China in the United Nations." (Pet. App. A3). Indeed, more than 50 nations still recognize the Government of The Republic of China.

The British Government recognized the Communist regime as the *de jure* government of the mainland of China as of midnight, January 5/6, 1950.[6] It is important to note, however, that the British have never recognized that the Chinese Communist regime was in *de facto* or *de jure* possession or control of Taiwan (Fdg. 25, R. 73-74). Attention is further invited to the conclusion of the Court of Appeals that ". . . no fiat of the British Government promulgated in the interest of its colonial possessions in the Chinese area can alter these facts or nullify the actual existence of a government (The Chinese Nationalist Government) *which is functioning as an independent nation.*" (Pet. App. A17).

---

[6] It should be noted, particularly when reading the opinions below, that references to "The Republic of China" do not thereby encompass any international entity connected with the Chinese Communist regime, since that regime is designated as "Central People's Government of the People's Republic of China" and the Communist state is entitled "People's Republic of China." (Thomsen, R. 6; Pet. App. A4).

B. The Insurer and the Policies

Since 1946 and 1947, when the vessels were sold by the United States to "The Government of The Republic of China, all marine and war risk policies were placed with petitioner, National Union Fire Insurance Company of Pittsburgh, which is an American company, represented by a syndicate referred to as "AIU" (Thomsen, R. 8; Blue R. 60a-61a)[7].

From the very beginning, petitioner insurer knew that the vessels had been sold to "The Government of The Republic of China" (Thomsen, R. 29; Pet. App. A17-A18) The named insured in all of the policies is "The Government of The Republic of China represented by Universal Trading Corporation". The policies also provide that losses, if any, are payable to the United States Maritime Commission or the Export-Import Bank for distribution to itself and to "The Government of The Republic of China" as their interests might appear (Pet. App. A4-5).

Petitioner conceded at the trial that it "recognized the Government of The Republic of China as owner of the fleet of vessels covered by the policies" (Fdg. 30, R 75; Pet. App. A4). Petitioner insurer "knew that the head office of CMSN had been transferred to Taipei and knew that CMSN was operating the ships as an agency or organ of the Nationalist Government. (Insurer) dealt with it as such. Before and after October

[7] American International Underwriters, Ltd. (one of the AIU companies and the company which actually signed the policies) is a Hong Kong company, maintaining offices in Hong Kong, as well as on the mainland of China at all material times. It always acted as underwriting and claims agent for the petitioner insurer. All knowledge by AIU was knowledge of the petitioner (Fdg. 27, R. 74).

1, 1949,[8] and January 5, 1950, premiums on the policies in question were paid to the respondent out of the funds of the Nationalist Government" (Thomsen, R. 9)[9]. Insurer knew of the transfer of the seat of the government to Taiwan, and certainly was currently informed of military and political events taking place on the mainland of China.

Moreover, on January 17, 1950, insurer was advised of the hoisting of the Communist flag on vessels in the port of Hong Kong. Nevertheless, it thereafter continued to transact insurance business, including payment of damage and loss claims, with the CMSN head office in Taipei, and renewed some of the policies covering the vessels in question as well as other Chinese Government vessels (war risk coverage was renewed on a monthly basis) (Fdgs. 30, 502, 506; R. 75, 109-110), and continued to accept and to retain premiums on the policies (Pet. App. A4). Indeed, insurer continued to issue policies naming the Government of The Republic of China as the insured until 1957.[10]

The policies were valued policies and insured the vessels in the following amounts. HAI HSUAN, $550,000; TENG KENG, $372,075; CHENG KUNG, $470,000; CHIAO JEN, $470,000; HUNG CHANG, $470,000; TSAI ER, $342,375; and LIN SHEN, $342,375.

---

[8] On or about this date the Communist regime proclaimed itself a government.

[9] See also Court of Appeals opinion, Pet. App. A4, for similar findings; also Fdgs. 28, 29, 30, R. 75; Fdgs. 502, 506, R. 109-110.

[10] Policy coverage with respect to the seven vessels in question was terminated as of April 1, 1950, but the same policies thereafter continued to cover other vessels owned by the Chinese Government.

Both the marine and war risk policies were placed with the same insurer in order to obtain full coverage and avoid the difficulties which have frequently arisen where the marine risks and war risks are covered by different insurers (Thomsen, R. 10). In respect to the instant policies, insurer reinsured about 80 per cent of the marine risks and at least 90 per cent of war risks with other companies, primarily in London (Fdg. 507, R. 111; Blue R. 62a-63a).

The marine policies contain the traditional "perils clause" insuring against:

> "Perils . . . of the Seas, . . . Enemies, Pirates . . . Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, *Barratry of the Master and Mariners,* and of all other like Perils, Losses and Misfortunes . . . excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the Policy or by endorsement." (Italics supplied)

The F. C. & S. ("Free of Capture and Seizure") clause in the marine policies excludes claims for loss, damage or expenses—

> "resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the vessel, by requisition or otherwise; whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations . . . Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy."

In the policies insuring against war risks, the principal insuring clause reads in pertinent part as follows:[11]

> "It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty".
>
> "This insurance is also subject, however, to the following warranties and additional clauses:—
>
> "*The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrection or civil strife*".
>
> * * *
>
> ". . . warranted not to abandon in case of capture, seizure or detention, until after condemnation of the property insured . . ." (Italics supplied)

The war risk policies also contain a *typewritten clause* which reads:

> "Excluding Capture and Seizure."

The marine and war risk policies contain the usual trading warranties which were modified from time to time to exclude ports in China occupied by the Communists. Originally, they read "Warranted no voyage to ports in China not in control of the *Government of The Republic of China.*" Later they were changed to "worldwide excluding the Baltic Sea, Black Sea and China north of Amoy, or held covered at additional premium to be arranged." On January 17, 1950, after

[11] For text of the Hulls (War Risks) provisions form, see Blue R. 125a. The layer upon layer of complicated riders, attachments, etc., are too bulky to reproduce here.

the defections in Hong Kong, the warranty was further changed to read: "world-wide excluding China *other than Hong Kong,* Formosa and Macao or held covered at additional premium to be arranged" (Thomsen, R. 12, 41-42; Pet. App. A5).

Thus, even after the defection, the insured continued to regard the port of Hong Kong as a safe port for vessels of "The Government of The Republic of China."

Petitioner's assertion (Pet., p. 8) that "petitioner, considering the indirect and limited protection against the risk of loss of possession of the vessels to the Communists afforded by the trading warranty to be inadequate, negotiated with the assured's brokers as a result of which there was added to the war risks policies the typewritten clause 'excluding capture and seizure'" is both misleading and incorrect. See for example the broker's testimony at Blue R. 59a-60a. As noted by both the District Court (R. 41-42) and the Court of Appeals (Pet. App. A5), the purpose of the trading warranties was to prevent the ships from going to ports in China "where they were in danger of being captured, seized or detained by Communist troops, ships or port officials" (Thomsen, R. 41-42).

In respect to the typewritten clause in the war risk policies "excluding capture and seizure", the District Court, based upon *all* the evidence of record, found: "In June, 1949, when the communist armies were rapidly extending their conquests down the coast of China, the clause 'excluding capture and seizure' was added to the war risk policies, evidently because the insurers feared that the ships would trade so near the coast of China that they might be captured by com-

munist gunboats or sampans, whether operated by the communist navy, port authorities or others, and because a clause which merely excluded certain ports would rapidly become obsolete."[12] This finding (as were all pertinent findings of fact) was concurred in by the Court of Appeals. See Pet. App. A5.

Although petitioner presented no witnesses at the trial to testify on any of the factual or legal issues, it took two steps in May 1950 (less than a month after it received the loss claims on the seven vessels) which are of considerable importance in construing the exclusionary clauses and also barratry coverage under the policies. First, in May, 1950, in an effort to avoid future liability for barratry losses on other vessels, it modified the war risk policies in question to "physical loss and damage only" (Fdg. 508, R. 111-112; Blue R. 67a-68a). Then, realizing that barratry was still covered under the marine policies, by letter dated May 11, 1950, insurer asked if the insured would agree to "exclude from marine policies risk, barratry and piracy as well as capture and seizure" (Lib. Exh. 146 id, Blue R. 100a), which the respondents refused to do (Blue R. 68a-73a, 101a).[13]

---

[12] As was so properly noted by the District Court (Thomsen, R. 42), "If the insurer had feared the masters and mariners of the ships themselves, as well as the communist gunboats and port officials, and had wished to be free of the risk of defection by the masters and mariners, the insurer could have excluded barratry from the risks assumed, or could have inserted a clause clearly excluding a loss caused by the defection of masters or the mariners."

[13] This was an attempt to modify existing marine policies which were issued on an annual basis. The particular letter was ruled inadmissible by the District Court. Respondents contended the ruling to be error before the Court of Appeals (Libelants' Assign-

Against this background, the Courts below considered the events relating to and resulting in the losses of the vessels in Hong Kong and the HAI HSUAN, which we shall now summarize.

C. The Six Hong Kong Vessels

During November and December, 1949, and January, 1950, 13 vessels owned by the Government of The Republic of China and operated by CMSN were in or sailed into the port of Hong Kong. Among them were six of the vessels which are the subject of this litigation, namely, the CHENG KUNG, CHIAO JEN, HUNG CHANG, TENG KENG, LIN SHEN, and TSAI ER. These vessels, which will hereafter be referred to as the Hong Kong vessels, remained in that port continuously from the period November/January, 1950 until September, 1950, when they sailed for Canton (Thomsen, R. 12; Pet. App. A6). We note, incidentally, that there is no evidence of record to support petitioner's assertion (Pet., p. 11) that the vessels were ultimately "ordered" by the Communist regime to go to Canton.

From November 13, 1949, until January 16, 1950, Mr. W. H. T. Wei, General Manager of CMSN, whose office was in Taipei, Taiwan, sent many messages by cable, radio and by hand, to the company's Hong Kong branch office and also directly to the masters, officers, and crews of the ships in Hong Kong, ordering the masters, officers, and crews to sail the vessels, including the six in question, out of Hong Kong and either return

---

ment of Errors, No. 4, Blue R. 121a). See 3 Corbin *Contracts* (1951) Sec. 558; *Cutting* v. *Bryan*, 30 F. 2d 754, 757-758 (C.C.A. 9, 1929). The Court of Appeals apparently did not consider it necessary to pass upon the point.

to Taiwan or sail to Japan or the Philippines. Among said orders was a lettergram dated December 27, 1949 (Lib. Exh. No. 76; R. 91), from the Ministry of Communications, and a cable of the same date from Mr. Wei (Lib. Exh. No. 78; R. 92), advising that the British Government reportedly planned to recognize the Chinese Communists on January 2, 1950, and ordering the vessels in Hong Kong immediately to sail to Taiwan ports or to Japan or the Philippines (Fdgs. 213-226, R. 83-97; Thomsen, R. 13; Pet. App. A6).

Instead of obeying these orders, during the period November, 1949 to January, 1950, "there were innumerable discussions among the masters, officers and crews, respectively, and between representatives of the several groups; separate meetings of masters, deck officers, radio operators, pursers, and others were held in various restaurants in Hong Kong during December and early January. These meetings proceeded in typical Chinese fashion, with no vote, but a clear sense at the end of each meeting that most of those present were opposed to sailing to Taiwan or Japan, and were in favor of declaring allegiance to the communist regime at the appropriate time." (Thomsen, R. 13).

Not only does petitioner fail to mention these meetings, but it also attempts to create an erroneous impression that the masters, officers and crews defected primarily because their families were living on the mainland and would have suffered "retaliatory penalties" (Pet. pp. 9 and 10). In fact, the District Court found upon *all* the evidence (which was based upon the depositions of officers and seamen who had returned to Taiwan and who attended the meetings, discussions, etc., in Hong Kong) that the reasons for the disobedience of orders and for the defection were as follows:

"The masters, officers and crew were reluctant to go to Taiwan and wished to remain in Hong Kong for the following reasons: (1) they were afraid their ships might be requisitioned by the military authorities on Taiwan; (2) they feared that if they went to Taiwan they would not be allowed to leave, but if they remained in Hong Kong they might be able to operate their vessels to ports in Southeast Asia and earn better pay; (3) the families of many of the men were living in Shanghai or other areas on the mainland under the control of the Chinese communists, and they were afraid that if they went to Taiwan, their families might suffer at the hands of the communists, or that they would not be able to send money to their families; (4) it was reported that the cost of living on Taiwan was very high and the living conditions very bad; (5) they wanted to remain in Hong Kong to see what the British were going to do; (6) they believe that Taiwan would soon fall into the hands of the communist regime; (7) they objected to the inter-guarantee orders of the Nationalist Government on Taiwan, which required that the behavior of each person coming to Taiwan be vouched for or guaranteed by other persons; and (8) the younger men were afraid they would be drafted into military service." (Thomsen, R. 14).

We parenthetically note that petitioner's statement that the masters and mariners by reason of their "domicile" became "citizens" of the Communist Republic (Pet., p. 10) is not supported by any evidence of record. Indeed, a reading of all of the depositions of the men who returned to Taiwan would reveal that a number of the masters and mariners had residences in Hong Kong. See, for example, Blue R. 91a. This Court can also take judicial notice of the fact that overseas Chinese are not necessarily citizens of the entity controlled by the Communists.

Moreover, petitioners have failed completely to point out to this Court the findings of the District Court (Thomsen, R. 14) and that of the Court of Appeals (Pet. App. A6), which establish beyond question that the disobedience of orders and the hoisting of the Red flag was the *voluntary* act of the masters, officers and crews, and that two ships in fact did sail from Hong Kong to Taiwan in January and February, 1950, after the defection (See also Fdg. 214, R. 92-93).

Petitioner's summary of the circumstances relating to the hoisting of the Communist flag (Pet., p. 10) is also misleading and inaccurate. As noted by the District Court:

> "... On the evening of January 15, Tso Wen-yuan, master of the Tsai Er, accompanied by three or four officers of other vessels, distributed flags of the Communist Government to the masters of the other ships ... The personnel of the Hong Kong office, having already defected, *purported* to give orders that the flags be changed; but *it is clear that Captain Tso of the Tsai Er was a ringleader in the conspiracy, and that the masters of all six vessels changed the flags voluntarily as a result of an agreement previously reached among themselves. The decision* of each master to defect to the communist regime and to change the flag *was his own deliberate decision*, made for some or all of the reasons outlined above, and induced in varying degrees by arguments and pressures employed and exerted by communist agents." (Thomsen, R. 16) (Italics supplied).

Petitioner asserts (Pet. p. 10) that Communist Government agents were operating not only in Hong Kong, but also on both the vessels. It fails to point out, however, that the presence of "agents" on the ships was admittedly only *inferred* by the District Court (Thom-

sen, R. 14). Neither does petitioner mention the following conclusions of fact arrived at by the District Court based on *all of the evidence* of record.

> ". . . there was no show of force or threat of violence by the communist troops or agents or by anyone else . . . Neither does the fact that communist agents on the ships or in Hong Kong may have persuaded some of the masters and others to refuse to sail to Taiwan and to take or acquiesce in the final action of changing the flags. There is no evidence that any communist agents went beyond argument and persuasion in securing the defection of the masters and mariners. No doubt the men were made acutely conscious of the fact that their families lived in Shanghai or other areas controlled by the communists; but there is no evidence that any reprisals were actually threatened if they did not change sides." (Thomsen, R. 43-44).

At p. 9, the petition refers to the purported order of January 9, 1950 by the Communist regime relating to Chinese personnel and property in Hong Kong. It is important to note, however, that this so called order appeared in a newspaper published in Hong Kong (Thomsen, R. 15), as well as the finding of the District Court that "no order to 'take over' the ships was offered in evidence" (Thomsen, R. 31). Futhermore, there is no evidence that the masters and crews acted pursuant to any such "order". Note also the conclusion of the Court of Appeals (Pet. App. A7) that: "However, while the vessels were at Hong Kong, no document or other paper was filed with the Government of Hong Kong showing any change in the port of registry, owner or flag of any of the six vessels."

Petitioner's reference at p. 11 to the remarks of counsel for the Chinese respondents is completely out

of context. At no time during trial did counsel for any of the respondents concede that only the events occurring on the date the Communist flag was hoisted should be looked to in determining liability under the policy. On the contrary, their consistent position has been that respondents are entitled to recover on the grounds, among others, of the barratrous acts committed prior to the hoisting of the Communist flag. See R. 211. Furthermore, see the District Court opinion in which it was stated that "the masters and many of the mariners of the six Hong Kong vessels were guilty of barratry in December, 1949 and January, 1950 in failing or refusing to sail to Taiwan or Japan as ordered", as well as "running up the Red flag and holding the ships for the Communist Government", and that "these barratrous acts, . . . *caused* the constructive total loss of the vessels . . ." (Thomsen, R. 27).

D. The Hai Hsuan

Again, as in the case of the Hong Kong vessels, the petition fails to present to this Court all of the pertinent facts, which are set forth in considerable detail in the District Court opinion (Thomsen, R. 16 et seq.), and which are summarized by the Court of Appeals (Pet. App. A7-8) as follows:

"The HAI HSUAN, unlike the other six vessels, was on the high seas proceeding easterly through the Indian Ocean bound for Japan at the time of the British recognition of the Communist Government and at the time of the defection of the personnel in the Hong Kong office. The officers and crew of the ship learned of these incidents through British radio broadcasts. The master received orders (by

radio from the head office at Taiwan not to stop at any British port and to proceed at all possible speed to Taiwan. He was anxious to comply but the crew objected, first arguing through the officers for a stop at Hong Kong then later pressing for Singapore. The master was advised by a member of the crew that the chief engineer was leading a plot against him and trying to convince the other officers and mariners that the ship should be kept from going to Taiwan. A radio dispatch was received from the communist-controlled Hong Kong office to put into Singapore and the officers and crew held a meeting to decide which orders to follow. The master informed the gathering that his orders alone should be obeyed. He decided that the ship should not go to Singapore. But, when the ship was 100 miles west of Singapore, the chief officer threatened to stop the engines if no call was made at that port. The master gave no heed to this statement but on the following day, January 23, when Singapore was thirty miles distant, the engines stopped and the master, several days without food and apparently quite ill, radioed Taiwan that he was sick in bed and requested orders. In reply the head office, unaware of the situation on board the ship, instructed the chief officer to assume command and proceed to Taiwan. Instead, he put into Singapore on January 24, and on January 26, after the master had been admitted to a hospital on shore, having left behind all papers, log books and radio messages, the communist flag was raised over the vessel. The wages of the crew were thereafter paid by the communists in control of the Hong Kong office. On February 1, China Merchants instructed Paul H. Paulsen, master mariner, to take command of the vessel in Singapore. Unable to get

police protection from the harbor authorities, he mustered a skeleton crew and, unarmed, boarded the ship. Upon request that the ship be turned over, the Chinese crew voted a refusal and grew belligerent. Captain Paulsen then abandoned the venture and took his men ashore."

Attention is also invited to the fact "that the officers and crew wanted to go to Hong Kong to take advantage of the cheap prices there and transmit money to their families in Shanghai." (Thomsen, R. 17). See also the arrival report filed with Singapore Harbor Authorities by the Chief Mate on January 24 (Libelants' Exh. No. 51; also Fdgs. 129-130, Blue R. 109a), two days before the Communist flag was hoisted in which report it was stated that the vessel's home port was Kaohsiung, Taiwan, and that the owner was CMSN.

As in the case of the Hong Kong vessels, the petition herein ignores all of the barratrous acts which preceded the hoisting of the Red flag on January 26, 1950 on the erroneous assumption that such acts merely constituted a barratrous delay. (Pet. p. 9). In this connection, see the following statement by the District Court (R. 27):

> "Many of the officers and crew of the HAI HSUAN were guilty of barratry in refusing to sail to Taiwan, stopping the engines in Singapore Straits, threatening Captain Hsueh, sailing into Singapore harbor in violation of the orders given to the master by the owner and transmitted by him to the mariners, running up the red flag, and refusing to turn the ship over to Captain Paulsen".

Referring to the message of January 23, 1950, in which the head office of CMSN in Taiwan directed the chief officer to take over command of the HAI HSUAN

because of Captain Hsueh's reported illness and to sail her directly to Taiwan, the District Court concluded that by January 23, 1950,

> ". . . the *mutinous* officers and crew *had already* assumed practical control of the ship . . ." 151 F. Supp. 211, 228 (R. 28) (Italics supplied)

Further on the District Court, referring both to the HAI HSUAN and to the six Hong Kong vessels, correctly held that:

> "The Chinese masters and mariners were employed by CMSN, a corporate agency of the Nationalist Government. They were paid by that agency, and had custody of its ships as its officers or employees. The ships were flying the flag of the Nationalist Government until January 16, 1950 (January 26, in the case of the HAI HSUAN). Under the laws of the Nationalist Government, to which they owed allegiance, *they were bound to obey the orders of General Manager Wei. Any willful failure to do so was barratry*, under Chinese, British, and American law." (Thomsen, R. 32). (Italics supplied)

In respect to the cause of the loss of the HAI HSUAN, as well as the six Hong Kong vessels, the Court of Appeals, in distinguishing *Cory* v. *Burr*, (1883) 8 App. Cas. 393, held as follows (Pet. App. A15):

> ". . . This holding *distinguishes the decision from the instant case where it has been found that the barratrous acts constituted the ultimate and efficient cause of the loss* of the Hong Kong ships, since it was brought about by the voluntary acts of the masters and crews in possession and was not compelled by the superior forces of the Communist Government. This is the more clear in the case of the Hai Hsuan since the defection of her crew

began on the high seas beyond any possible reach of the communist forces." (Italics supplied)

DECISIONS BELOW

After extensive trial, including many preliminary hearings, the District Court rendered a full and carefully considered decision holding the petitioner liable for the loss of the Hong Kong vessels on the ground that the acts of the masters and mariners during the period November, 1949 and January, 1950, including the hoisting of the Communist flag, constituted "barratry" and not "seizure" and were the cause of the losses (R. 27; Pet. App. 15). In holding that there was no "seizure" within the meaning of either the marine or war risk policies, the District Court considered not only the case of *Greene* v. *Pacific Mutual Ins. Co.* 91 Mass. (9 Allen) 217 (1864), but also other precedents, including the cases now cited by petitioner, and the context of the documents and of the transactions surrounding issuance of the policies. On the basis of *all the circumstances* involved, the Court concluded that the word "seizure" cannot be applied to any barratrous act of the master, and "he cannot be justly said to seize that which is in his own keeping"; and further that "If an insurer wishes to exclude coverage for the barratrous act of the master in changing sides in a civil war, . . . it should say so explicitly and not rely upon such ambiguous clauses as we face in these cases. The policies were prepared by the insurer and its agents; any ambiguity must be resolved against the insurer" (Thomsen, R. 44-45).

The District Court further noted that the losses of the Hong Kong vessels were covered under the clause in the War Risk policies insuring against "the risks . . .

civil war, revolution rebellion, insurrection or civil strife arising therefrom"; but it expressed this view "only because there were different reinsurers" (Thomsen, R. 46). Although discussed, the petitioner did not request the District Court to resolve any possible controversy between reinsurers as to which policies covered.

In respect to the HAI HSUAN, the District Court, although finding that the loss was caused by the barratrous acts of the officers and crew, also concluded that such acts were a "seizure" within the meaning of the policies, thus relieving petitioner of liability, on the ground that the *Greene* case "recognizes the distinction between 'the possession and control' of the ship by the master and the 'qualified possession' by the mariners" (Thomsen, R. 45).

The *Greene* case, however, squarely held that there can be no "seizure" by the officers and crew. On appeal, the Court of Appeals for the Fourth Circuit affirmed the District Court's decision with respect to the Hong Kong vessels and reversed with respect to the HAI HSUAN, pointing out that it was unable to accept the distinction made by the District Court between the possession and control of the ship by the masters and the qualified possession by the crew (Pet. App., A13). In so deciding, it quoted with approval the statement of Chief Justice Bigelow in the *Greene* case that: " 'If they violate their duty and disobey the master, displace him from command and assume entire control of the vessel, it is a breach of trust rather than a seizure' " (Pet. App., A14).

In addition to noting that the cases relied upon by petitioners below (and in the instant petition) are not

apposite (Pet. App., A14-A18), the Court of Appeals further concluded that the characterization of an act as barratrous is independent of the motives which provoked the act", and therefore that there was no merit to insurers' contention that barratry cannot encompass acts of masters and mariners who change sides in a civil war (Pet. App., A18)[14]

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

Barratry is covered by the marine policies, and it is respondents' position that one need not look beyond the marine policies in order to hold petitioner liable. In any event, the war risk policies insure against the risk of barratry arising out of or consequent upon "civil war, revolution, rebellion, insurrection or civil strife". In this connection, it will be noted that the marine and war risk policies "are complimentary and were placed with the same insurer in order to obtain full coverage except for the items specifically excluded, and to avoid the troublesome questions that arise so often when the two policies are issued by different insurers" (Thomsen, R. 10). Therefore, whether barratry is covered under the marine or war risk policies is of no consequence, except as between the reinsurers, with which question we are not here concerned.

Consequently, the basic issue involved in this litigation (apart from the possibility of holding petitioner liable under the provision in the war risk policies insuring against the risks of civil war, etc., regardless of

---

[14] The classic definition of barratry by Lord Ellenborough in *Earle* v. *Rowcroft*, (1806) 8 East 126, 138 (quoted by the Court of Appeals, Pet. App., A8-A9) points out that motive is an immaterial factor.

barratry) is whether the acts of the masters and mariners constituted barratry, for which petitioner would be liable under either the marine or war risk policies, or whether such acts constituted a "seizure" within the meaning of the F. C. & S. ("Free of Capture and Seizure") warranty in the marine policies or the typewritten clause in the war risk policies "excluding capture and seizure".

A. As to Barratry

There is no need for clarification of the term "barratry". Its meaning has been long established (the leading decisions and other authorities are reviewed by the District Court, R. 26-27, and by the Court of Appeals, Pet. App. A8-A9).[15] Briefly, it covers a breach of trust or duty by the master or mariners, regardless of motivation. And it is clear beyond question that, in the instant cases, the acts of the masters except the master of the HAI HSUAN) and mariners constituted barratry, and that their deliberate, voluntary and barratrous conduct caused the loss of the vessels, as both lower Courts so found (R. 27; Pet. App. A15).

Petitioner's contention (Pet., pp. 28-32), that the Court of Appeals opinion leaves in vague and "very generalized terms the question of what is . . . barratrous conduct within the coverage against war risks" which "can only cause future confusion" unless clarified by

---

[15] Note also *Earle* v. *Rowcroft*, (1806) 8 East 126, 136, 103 Eng. Rep. 292, 296, wherein, Lord Ellenborough, after giving the classic definition of barratry, further said:

> ". . . I make no question that there may be such a deviation as will amount to barratry; as where the master deviates to . . . throw the ship into the enemy's hands. . ."

this court (Pet., p. 32), is without merit for several reasons. First, petitioner did not request the Court of Appeals, or even the District Court, to make such a determination in the event it found insurer liable.[16] Second, since the marine and war risk policies are complimentary and were placed with the same insurer, the particular point would have been, and is, of academic interest only. See in this connection *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, where this Court, in discussing Rule 19 observed that "it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic".

True, the District Court observed that the losses in respect to the six Hong Kong vessels were covered by the clause in the war risk policies insuring against the risks of "civil war, revolution, rebellion, insurrection or civil strife" (R. 46). However, in making this observation, the District Court noted that "the question is important *only* because there were different reinsurers" (R. 46). It is submitted that a possible conflict between reinsurers does not justify granting the petition.[17]

---

[16] Petitioner conceded during trial that it "would be liable under the war risk for 4-B" (Tr. 1620). Item 4-B, which was one of a series of questions posed by the District Court, requested the parties to state their position in respect to a loss resulting from "barratry consequent of civil war—no capture and seizure".

[17] At the District Court level, petitioner refused to disclose the name of the reinsurers on the ground they were not in privity and the information was irrelevant (See Libelants' Assignment of Errors, No. 10, Blue R. 122a).

Neither is there any conflict between the Court of Appeals ruling that barratry was committed and the statement of this Court in *Guaranty Trust Co. v. U. S.*, 304 U.S. 126, 137 that "the rights of a sovereign state are vested in the state rather than any particular government", as asserted at pp. 32-33 of the petition.[18] First, The Republic of China and its government (as distinguished from the "Communist People's Republic of China") does exist as an independent nation,[19] as noted by the Court of Appeals (Pet. App. A17). Second, the vessels were registered at ports in Taiwan and were flying the Nationalist flag. See *Lauritzen v. Larsen*, 345 U.S. 571, 583 et seq. where this Court points out that the law of the flag and port of registry governs the relations between owner and crew, and not the law of the port where the vessel is temporarily at anchor. Third, the British have never recognized the Communist regime as being in *de facto* or *de jure* control of Taiwan. Fourth, before, during and after the losses of these vessels: (a) petitioner knew that the vessels had been sold by the United States to "The Government of The Republic of China"; (b) petitioner recognized "The Government of The Republic of China" a the owner of the vessels; (c) petitioner was well aware of the long existing conflict in China between the Communists and the recognized Nationalist

[18] From this proposition, petitioner erroneously contends that, since the vessels were in Hong Kong, and since the British recognized the Communist regime, no duty was owed by the masters and mariners to the Government of The Republic of China.

[19] A state or international person exists where: (a) there is a people; (b) there is a country in which the people are settled down—no matter what its size; (c) there is a government; (d) the government is sovereign. 1 Oppenheim, *International Law* (2d ed.) pp. 108-109.

Government; (d) petitioner knew The Government of The Republic of China and CMSN were located on Taiwan during 1949; and, (e) before, during and after the losses, petitioner continued to transact insurance business, including payment of damage and loss claims, with the CMSN head office in Taipei, Taiwan. As noted by the Court of Appeals (quoting with approval the District Court): "With knowledge of these facts, respondents, both before and after October 1, 1949, and after January 5, 1950, issued policies of insurance to the Government of the Republic of China as the named insured and accepted premiums thereon. Respondents *are estopped* to deny that the ships were owned by the Government of the Republic of China, the Nationalist Government, as distinguished from the sovereign state or national entity, China. . . ." (Pet. App. A18; also Pet. App. A4). Fifth, even after the defection, petitioner continued to issue policies naming the Government of The Republic of China as the assured, and as evidenced by the trading warranties (supra, pp. 10-11), insured against losses that might occur in the port of Hong Kong. Sixth, if British recognition of the Communists divested the Government of The Republic of China of property rights in the vessels, which is denied, the losses would be attributable to, and recoverable under the policies by reason of, the preceding acts of barratry. Seventh, the United States holds mortgages on these vessels. Consequently, carried to its logical conclusion, petitioner's contention (which reduces itself to the proposition that th Communist regime should be regarded as owner) would place the United States in the embarrassing and untenable position of a mortgagee with a government it has consistently refused to recognize. Eight, the *Guaranty Trust Co.* case, 304 U.S. at 231, affirms the rule that recogni-

tion by the United States of a foreign government is conclusive in all courts in this country.[20] Accord, *United States* v. *Pink*, 315 U.S. 203, 229-230.

B. As to Capture and Seizure

Neither are there any "special and important reasons" which require this Court to pass upon the remaining issue, i.e., whether the barratrous acts of the masters (except for the master of the HAI HSUAN) and mariners constitute "seizure" within the meaning of the F. C. & S. ("Free of Capture and Seizure") warranty in the marine policies or the typewritten clause in the war risk policies "excluding capture and seizure".[21]

The precise issue was resolved 94 years ago in what the Court of Appeals describes as the "*celebrated and*

---

[20] See Lib. Exhs. 104 and 106 (Fdgs. 509 and 510, R. 112) for State Department certifications issued in the present litigation, refusing, inter alia, to recognize that any ownership rights were acquired in the vessels by the Communists.

[21] It will be observed that petitioner is liable under the marine or war risk policies if the losses occurred as a result of: (a) barratry; (b) barratry as a consequence of civil war, etc.; (c) consequences of civil war, etc., regardless of barratry; (d) if barratry leads up to or is a concurrent or co-operative cause of the losses. *Calmar* v. *Scott*, 209 F. (2d) 852, 857 (2 Cir., 1954); 2 Arnould *On Marine Insurance* (14th ed., 1954) sec. 858; Hugh Mullins, *Marine Insurance Digest* (1951), p. 21; *Lanasa Fruit Co.* v. *Universal Ins. Co.*, 302 U.S. 556, 564-565; *Pike* v. *Merchants' Mutual Insurance Co.*, 26 La. Ann. 392, 397 (1874); *American Insurance Co.* v. *Dunham*, 12 Wend. (N.Y.) 463, 468 (1834); *Waters* v. *Merchants' Louisville Ins. Co.*, 11 Peters (36 U.S.) 213; *Vallejo* v. *Wheeler*, 1 Cowp. 143, 98 Eng. Rep. 836, 843-844; *Dixon* v. *Reid*, (1822) 5 *Barn. & Ald. Rep.* 597, 106 Eng. Rep. 1309; *Roscow* v. *Corson*, (1819) 8 Taunt. 684, 129 Eng. Rep. 550; *Mentz, Decker & Co.* v. *Maritime Ins. Co., Ltd.*, (1909) 16 Com. Cas. 17

widely cited opinion of Chief Justice Bigelow in *Greene v. Pacific Mutual Ins. Co.*, 91 Mass. (9 Allen) 217 (1864)" (Pet. App. A9), where it was held that the word "seizure" cannot be applied to the acts of the master or mariners, but is intended to "exempt the insurers from liability to loss arising from a forcible taking of the vessels by *others* than the officers or crew", 91 Mass. (9 Allen) at 222.

The holding in the *Greene* case has been repeatedly cited and accepted by text writers in the United States.[22] The marine underwriting trade in London also shares the same views, as evidenced by the comments in various issues of *Fairplay* (founded in 1883) and *The Post Magazine & Insurance Monitor* (founded in 1840, and the oldest insurance journal in the world) which are reprinted in the appendix hereto. As noted in the July 25, 1957 issue of *The Post Magazine & Insurance Monitor* (App., p. 10a):

> "If it is so patent that barratrous seizure is excluded by the F. C. & S. clause, it is astonishing that underwriters in this market have never adopted that line of defense. . ."

As noted by both courts below (Pet. App. A13; Thomsen, R. 39), it is obvious that underwriters of marine insurance, their technical advisers and brokers have been long familiar with and have understood that the phrase "capture and seizure" cannot apply to barratrous acts of the master or mariners.

[22] 1 Phillips, *Insurance* (5th ed.; 1867) p. 652; 1 Parsons *Law of Marine Insurance*, (1868) 554; Richards *On Insurance* (4th ed., 1924) p. 834; 5 Appleman, *Insurance Law and Practice*, (1941) sec. 3256, note 37; also, *38 Words and Phrases* p. 526 under "Seizure, marine insurance"; 57 Corpus Juris, *Seizure*, Sec. 3, p. 105, under "Seizure special maritime sense"; and 45 C.J.S., *Insurance*, Sec. 863, p. 939.

There is no merit to petitioner's contention (Pet., pp. 33-38) that the decisions below are in conflict with those of the House of Lords in *The Minden*, 1942 A.C. 50 and *Cory* v. *Burr*, (1883) 8 App. Cas. 393. These decisions do not involve the issue of "barratry" versus "capture and seizure" which is involved in the present litigation, and are not apposite for the reasons noted by the Court of Appeals (Pet. App. A14-A15). We concur with the views set forth in the brief in opposition filed herein by the Solicitor General in respect to the inapplicability of these two cases, and therefore do not here comment further except to note: (a) that the holding in *Cory* v. *Burr*, concerned only with the proper rule of causation, has been severly criticized in England; see Arnould *On Insurance* (14th ed., 1954) Sec. 858, n. 32; 18 Halsbury's *Laws of England* (2nd ed., 1935) p. 322 note "(p)"; (b) that the marine underwriters in London apparently do not share the views expressed by petitioner, as evidenced by the comments in *Fairplay* and *The Post Magazine & Insurance Monitor* appended hereto; and (c) that "our practice here is no more than to accord respect to *established* doctrines of English maritime law"; see *Standard Oil Co. of New Jersey* v. *United States*, 340 U.S. 54, 59.

Moreover, it will be recalled that the typewritten clause "excluding capture and seizure" was put into the war risk policies by insurer[23] under circumstances which properly resulted in a finding by both courts below that its purpose was to avoid liability in the event of capture by Communist forces, such as gunboats or sampans (Thomsen, R. 42; Pet. App. A5).

---

[23] Any doubts must be resolved against insurer. *Calmar S.S. Corp.* v. *Scott*, 209 F. (2d) 852, 856 (2 Cir., 1954).

Finally, the petition should not be granted for the simple reason that any decision rendered by this Court, as well as those of the lower courts, could be nullified by the underwriters by amending the insurance policies, which are short term contracts. In fact, petitioner did not even await a court decision in these cases to make such amendment. In May, 1950, eight years ago, and after the losses had occurred, war risk coverage issued to respondents herein was limited by a rider to *physical loss and damage only*, for the purpose of avoiding liability thereunder for losses based on barratry (Blue R. 68a). Underwriters could and presumably would take steps in respect to coverage issued to shipowners similarly situated, assuming there are any.[24]

It is therefore manifest that a resolution by this Court of the particular issues here involved with respect to these particular policies cannot be and is not "of importance to the public, as distinguished from the parties". *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393.

In terms of the isues involved in the present litigation, therefore, there is no substance to petitioner's assertion (Pet., pp. 19-21) that shipowners and underwriters,[25] have a "vital concern" in knowing what

---

[24] So far as known, there is no other litigation pending or threatened involving facts and issues similar to those here presented.

[25] Petitioner's assertion that extension of the *Greene* case to the field of war risk could well result in an increase in premium rates (Pet., p. 19) is pure speculation. Moreover, if policies covering identical risks were issued during the last eight years, it is probable that any justifiable increase in premium rates has long since taken place.

losses by "seizure" come within the "scope of the protection afforded them by the war risks policies", (which is far too broad a task for any court). Neither is there any "uncertainty and conflict as to the meaning and scope of the term 'seizure' in connection with war risk coverage" (Pet., p. 21), which this Court must or can resolve for the benefit of the Secretary of Commerce. We parenthetically note that the Maritime Administration holds the mortgages on four of the vessels, is under the jurisdiction of the Secretary of Commerce, has pressed for recovery on the theories here advanced, and has actively participated in the present litigation.

Contrary to petitioner's assertions (Pet., p. 21), it cannot be seriously contended that the myriad unique set of circumstances which resulted in the losses of the seven vessels is likely to recur and to result in claims under policies identical to those here in question. What seems more apparent, particularly when one measures petitioner's version of the facts against those of the two courts below, is that petitioner's contentions are principally directed to the factual determination of the lower courts. This Court, however, has consistently held that certiorari will not be granted to review concurrent findings by two courts below. *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51; *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214; *Allen* v. *Trust Co. of Georgia*, 326 U.S. 630, 636.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

ROBERT E. KLINE, JR.
RONALD A. CAPONE
WILLIAM A. GRIMES

Proctors for Respondents

The Republic of China
and China Merchants
Steam Navigation
Company, Limited.

Of Counsel

KIRLIN, CAMPBELL & KEATING
and
OBER, WILLIAMS, GRIMES
& STINSON

August 4, 1958